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No. 09-1343

In the Supreme Court of the United States

J. McINTYRE MACHINERY LTD.,
Petitioner,

v.

ROBERT NICASTRO, et al.,
Respondents.

On Writ of Certiorari to the Supreme Court of New Jersey

BRIEF OF *AMICUS CURIAE* DOW CHEMICAL CANADA ULC IN SUPPORT OF PETITIONER ON THE MERITS

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INTEREST OF THE AMICUS CURIAE[1]

Amicus curiae Dow Chemical Canada ULC (Dow Canada) addresses the question, left open in *Asahi Metal Industry Co., Ltd. v. Superior Court*, 480 U.S. 102, 108-13, 116-21 (1987), of whether placing products into the stream of commerce in a foreign country (or another State), aware that some may or will be swept into the forum State, is enough to subject a defendant to personal jurisdiction—or whether, as shown below, due process requires that the defendant have engaged in additional conduct, directed at the forum, before it can be found to have purposefully availed itself of the privilege of conducting activities within the forum State. Dow Canada urges reversal of the New Jersey Supreme Court's decision below because it relied on the foreign defendant's contacts solely with the stream of commerce—not contacts with the forum—to assert personal jurisdiction over petitioner J. McIntyre Machinery Ltd. *See* pet. app. 13a, 31a-32a.

Dow Canada has faced this issue repeatedly and has been subjected to inconsistent decisions. Dow Canada is a Canadian corporation; it operates, has

[1] This brief is submitted pursuant to the general consent of each party to the filing of amicus briefs. The Clerk received consents from respondents and petitioner, respectively, on October 13 and 15, 2010. This brief has not been authored, in whole or in part, by counsel for a party in this case (No 09-1343). No monetary contribution intended to fund the preparation or submission of this brief has been made by any person or entity other than Dow Chemical Canada ULC or its counsel.

its headquarters, and employs people in Canada. It has been sued in product liability actions in various American state and federal courts over component parts that its predecessor supplied exclusively in Canada. Dow Canada's predecessor did not market or ship those components into any of the States. Rather, an unrelated Canadian manufacturer purchased the components pursuant to arms-length transactions under Québec law and then incorporated them into finished products that it distributed for sale in the United States and elsewhere.

The inconsistent rulings in these cases illustrate the arbitrary assertion of jurisdiction and the need for resolution by this Court. Dow Canada has been dismissed from a number of these cases, but several state courts have asserted personal jurisdiction over Dow Canada because of its predecessor's contact with the stream of commerce in Canada—despite the absence of contact with a forum State.

Dow Canada has presented the stream-of-commerce question in its pending petition for a writ of certiorari in *Dow Chemical Canada ULC v. Fandino*, No. 10-250. That case arises from an action pending in the Superior Court of California for the County of Los Angeles. There, the California court has asserted personal jurisdiction over Dow Canada based solely on a finding that its predecessor component supplier was told by the Canadian finished-product manufacturer that finished products incorporating the components would be sold in the United States, including California. Pet. (No. 10-250), app. C at 5a-6a.

Thus, jurisdiction has been imposed simply because the foreign supplier placed component parts in the stream of commerce in a foreign country with awareness that some would end up in the forum State as part of finished products—even though the supplier did nothing to get them there. Under the stream-of-commerce test proposed by Justice Brennan (joined by three other justices) in *Asahi*, 480 U.S. at 116-21, the California court's finding would meet the minimum-contacts threshold for personal jurisdiction. But as Justice O'Connor (joined by three other justices) explained in *Asahi*, *id.* at 108-13 (Part II-A, the stream-of-commerce-plus approach), the Due Process Clause requires more than mere placement of products into the stream of commerce, with awareness that some may or will be swept into the forum State.

Besides Dow Canada's specific interest in vindicating its due process rights in that particular litigation, Dow Canada has the interest it shares with other foreign businesses generally in seeking protection against the unconstitutional (and arbitrary) assertion of personal jurisdiction by state and federal courts in the United States.

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . . .

SUMMARY OF ARGUMENT

The "stream-of-commerce" test being used by a number of lower courts departs from basic due process requirements for the assertion of personal jurisdiction. It does not require an act by the nonresident defendant directed at the forum State, and it does not even require the nonresident defendant's intent directed at the forum State. Instead, it subjects a defendant to personal jurisdiction for placing a product into the stream of commerce—anywhere in the world—if the defendant is made aware that the product may or will be swept into the forum State. This Court has never upheld jurisdiction based solely on such conduct.

Stream-of-commerce jurisdiction substitutes a defendant's contact with the stream of commerce anywhere in the world—for contact with the forum State. Ignoring this Court's holdings to the contrary, it subjects a foreign defendant to personal jurisdiction based not on its own conduct directed at the forum State, but on the unilateral acts of others. We illustrate this with Dow Canada's case involving the supply of component parts, exclusively in a foreign country, with no control over where the purchaser's ultimate finished products were sold.

The "awareness" ostensibly required for stream-of-commerce jurisdiction is susceptible to manipulation and subjects foreign businesses to arbitrary assertions of personal jurisdiction. To satisfy due process, personal jurisdiction must be

predicated on a foreign defendant's verifiable conduct directed at the forum.

Stream-of-commerce jurisdiction improperly burdens foreign businesses that engage in commercial transactions exclusively in foreign countries, effectively subjecting them to suit in any State and the governance of their foreign transactions according to the product-liability laws of 50 different States. The assertion by some States that foreign businesses must take affirmative steps to avoid jurisdiction in American courts imposes a further improper burden on foreign commerce.

In addition, we address the specific point that the foreign manufacture of a product in conformity with U.S. safety standards is not a basis to assert personal jurisdiction over the foreign manufacturer.

ARGUMENT

I. For Personal Jurisdiction, Due Process Requires the Act and the Intent of the Foreign Defendant Directed at the Forum State

This Court has long recognized that "[t]he Due Process Clause of the Fourteenth Amendment limits the power of a state court to render a valid personal judgment against a nonresident defendant." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291 (1980); *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408,

413-14 (1984); *accord Shaffer v. Heitner*, 433 U.S. 186, 216 (1977) ("The Due Process Clause 'does not contemplate that a state may make binding a judgment . . . against an individual or corporate defendant with which the state has no contacts, ties, or relations,' " quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)); *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877) ("[s]ince the adoption of the Fourteenth Amendment," judgment by court lacking jurisdiction over parties does "not constitute due process of law").[2]

This Court has long required "minimum contacts" between the defendant and the forum State as the starting threshold essential to personal jurisdiction. *International Shoe*, 326 U.S. at 316-17 (holding that due process requires that defendant from outside the forum State "have

[2] "The proposition that the judgment of a court lacking jurisdiction is void" was established in English common law long before the Founding. *See Burnham v. Superior Court of California*, 495 U.S. 604, 608-09 (1990) (Scalia, J., joined by three other justices)

In a broader sense, the Declaration of Independence decried a government's assertion of authority over those not properly subject to its jurisdiction. Regarding Parliament's assertions of legislative authority over American colonies, the Declaration objected that King George III "has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; . . ."

As for the United States, the Declaration did not announce America's intent to impose its will on the world; rather, it claimed an "equal station" "among the powers of the earth," and it voiced this with "a decent respect to the opinions of mankind . . ."

certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice' "—"such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, . . . "); *World-Wide Volkswagen*, 444 U.S. at 291 ("a state court may exercise personal jurisdiction over a nonresident defendant only so long as there exist 'minimum contacts' between the defendant and the forum State").[3]

The "minimum contacts" requirement reflects two essential constraints on the exercise of personal jurisdiction over nonresidents—fairness to nonresident defendants and limits of state power. *World-Wide Volkswagen*, 444 U.S. at 291-92 ("The concept of minimum contacts .... protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system").

Even in interstate disputes, this Court has repeatedly cautioned that while technological progress has increased the flow of commerce between the States and lessened the burden of defending in another State, the necessity of the

[3] In *Asahi*, 480 U.S. at 113-16, this Court discussed the additional due process requirement that the assertion of personal jurisdiction over a foreign defendant be fair and reasonable, considering private and public interests.

defendant's connection with the forum still inheres in limitations on state power. *Hanson v. Denckla*, 357 U.S. 235, 250-51 (1958) ("[I]t is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. [Citation.] Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he [or she] has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him [or her]."); *accord World-Wide Volkswagen*, 444 U.S. at 294.

And the convenience of a forum for a plaintiff, its relative convenience for the defendant, or its close connection with the underlying action cannot offset a defendant's lack of requisite contact with the forum. *World-Wide Volkswagen*, 444 U.S. at 294 ("Even if the defendant would suffer minimal or no inconvenience from being forced to litigate before the tribunals of another State; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for litigation, the Due Process Clause, acting as an instrument of interstate federalism, may sometimes act to divest the State of its power to render a valid judgment."); *Shaffer v. Heitner*, 433 U.S. at 215 ("even if . . . the importance of [the forum State's] interest is accepted, . . . we have rejected the argument that if a State's law can properly be applied to a dispute,

its courts necessarily have jurisdiction over the parties to that dispute."); *Hanson v. Denckla*, 357 U.S. at 254 ("[A state] does not acquire . . . jurisdiction by being the 'center of gravity' of the controversy, or the most convenient location for litigation. The issue is personal jurisdiction, not choice of law. It is resolved in this case by considering the acts of the [defendant].").

Critically, to find the requisite minimum contacts, the out-of-state defendant—not some third party—must, by its own actions, have purposefully availed itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.

> The unilateral activity of those who claim some relationship with a nonresident defendant *cannot* satisfy the requirement of *contact* with the forum State. . . . [I]t is essential in each case that there be some *act* by which the *defendant* purposefully avails itself of the privilege of *conducting activities within the forum State*, thus invoking the benefits and protections of its laws.

Hanson v. Denckla, 357 U.S. at 253 (emphases added); *Asahi*, 480 U.S. at 109 (O'Connor, J., joined by three other justices); *Burger King Corp. v. Rudzewicz* (1985) 471 U.S. 462, 474-475 ("This 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result . . . of the 'unilateral activity of another

party or a third person' "); *World-Wide Volkswagen*, 444 U.S. at 297-98; *Kulko v. Superior Court of California*, 436 U.S. 84, 93-94 (1978). *Compare Shaffer v. Heitner*, 433 U.S. at 213 (finding no minimum contacts where the plaintiff "did not allege and does not now claim that [the defendants] have ever set foot in [the forum State]. Nor does he identify any *act* related to his cause of action as having taken place in [the forum State]." (emphasis added)) *and Helicopteros*, 466 U.S. at 417 ("unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State") *with Burger King*, 471 U.S. at 479-82 (upholding jurisdiction in Florida under Due Process Clause where defendant had "deliberately" reached out and "negotiated with a Florida corporation for the purchase of a long-term franchise" with "exacting regulation of his business from Burger King's Miami headquarters" and "documents providing that all disputes would be governed by Florida law"; finding that defendant " 'purposefully availed himself of the benefits and protections of Florida's law' ").

Thus, the "minimum contacts" test requires (1) an act ("availment") and (2) intent ("purposeful"). And it requires the act and the intent *of the defendant* directed specifically at the forum State.

II. Jurisdiction Based on Contact with the Stream of Commerce Alone Lacks the Due Process Requirements of the Act and the Intent of the Foreign Defendant Directed at the Forum State

The assertion of jurisdiction based solely on contacts with the stream of commerce outside the forum—under the so-called "stream-of-commerce" test—would collapse and ultimately obliterate the two-pronged requirement of an act and intent of the defendant directed at the forum. The test asserts that a foreign defendant has "minimum contacts" with the forum State based simply on placing products into the stream of commerce in a foreign country (or another State) with awareness that some such products may or will be swept into the forum State. *See Asahi*, 480 U.S. at 116-21 (opinion of Brennan, J., joined by three other justices). This Court has never upheld jurisdiction based solely on such conduct.[4] Stream-of-commerce jurisdiction violates due process because it does not require both (1) an act and (2) an intent *of the defendant* directed specifically at the forum State.

[4] On the other hand, the Court has acknowledged minimum contacts in circumstances that would satisfy the competing stream-of-commerce-plus test. *See, e.g., Quill Corp. v. North Dakota*, 504 U.S. 298, 302, 307-08 (1992) (citing personal jurisdiction cases; finding that nonresident mail-order house that "engaged in continuous and widespread solicitation of business within a State," and shipped its merchandise to purchasers in the State, had minimum contacts satisfying due process threshold for use tax); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 773-74 (1984) (finding that principal defendant's regular circulation of magazines in the forum State was sufficient to support jurisdiction).

First, this stream-of-commerce jurisdiction does not require an *act* by the foreign defendant directed at the forum State. It collapses "purposeful availment" to just "purposeful." Placing a product into the stream of commerce—anywhere in the world *but* the forum—is deemed to suffice for the foreign defendant's conduct. The defendant is subjected to jurisdiction as a result of the unilateral act of another who actually distributes the product into the forum State—notwithstanding this Court's well-established jurisprudence to the contrary. *E.g.*, *Helicopteros*, 466 U.S. at 417; *World-Wide Volkswagen*, 444 U.S. at 297; *Hanson v. Denckla*, 357 U.S. at 253.

This is illustrated by Dow Canada's case. Dow Canada's predecessor (like Dow Canada, a Canadian corporation) supplied certain gas tanks exclusively in Canada to Bombardier Inc., an independent Canadian manufacturer that used the gas tanks in making Sea-Doo personal watercraft. Pet. (No. 10-250) at 5. Thereafter, Bombardier elected to distribute some of its Sea-Doo personal watercraft for sale in the United States, including California. *Id.* at 5-7. As a component-part supplier, Dow Canada's predecessor had no control over where Bombardier chose to sell its finished products. The California courts nevertheless asserted personal jurisdiction over Dow Canada, even though Dow Canada's predecessor never marketed or shipped its components to California. *Id.* at 7-9.

Second, the stream-of-commerce test obliterates the "purposeful availment" standard because it

does not even require the *intent* of the foreign defendant directed at the forum State. Instead, it permits jurisdiction based on the defendant's simple knowledge or awareness that its products may or will be carried through the stream of commerce to the forum State. Simply being informed about the downstream activities of others directed to the forum State is deemed sufficient to subject the defendant to personal jurisdiction in the forum. Thus, the requirement established by this Court—that "the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws"—is being replaced by a "passive listening" test.[5]

[5] The requirement of an act and an intent of the defendant was not displaced by a mere awareness test in *World-Wide Volkswagen*. In dicta, the opinion indicated that a State could assert personal jurisdiction "over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." *World-Wide Volkswagen*, 444 U.S. at 297-98. A proper construction of this reference to a defendant's "expectation," however, must recognize the material distinction between the prescriptive and the descriptive meanings of "expectation." "Expectation" in the descriptive sense—as in awareness or foreseeability of what will happen—is not a sufficient basis for jurisdiction. Indeed, the Court stated that " 'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause " *Id.* at 295. "Expectation" in the prescriptive sense, however, where a defendant exercises control and directs the sale of its products in the forum State—e.g., selling products to consumers and distributors inside the forum State—constitutes purposeful availment In

(*continued on next page*)

This, too, is illustrated by Dow Canada's case. The California courts based jurisdiction solely on the declaration of a Bombardier employee that, sometime in "the early 1990s," he told unidentified "representatives" of Dow Canada's predecessor corporation that Bombardier personal watercraft, which incorporated the component gas tanks, would be sold across the United States, including California. Pet. (No. 10-250) at 7.

Again, this stream-of-commerce test impermissibly imposes personal jurisdiction on the foreign defendant based on the unilateral conduct of others. When a third party downstream takes the defendant's products and sends them to the forum State, and in some manner informs the defendant that this is happening, it is still the conduct of the third party—not the foreign defendant—for which the stream-of-commerce test subjects the foreign defendant to jurisdiction.

Subjecting a foreign defendant to personal jurisdiction based on the "unilateral activity of those who claim some relationship with a nonresident defendant" is contrary to this Court's established jurisprudence. *E.g.*, *Burger King*, 471 U.S. at 474-475; *Helicopteros*, 466 U.S. at 417; *Hanson v. Denckla*, 357 U.S. at 253. To hold a foreign defendant subject to personal jurisdiction based on the unilateral conduct of another offends

World-Wide Volkswagen, the Court focused on whether "*the defendant's* conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *Id.* at 297 (emphasis added).

"traditional notions of fair play and substantial justice."[6]

III. Stream-of-Commerce Jurisdiction Also Improperly Burdens Foreign Commerce and Impairs the Orderly Administration of the Laws

Ultimately, the stream-of-commerce test would generate tentacles for state courts to assert jurisdiction over foreign businesses in the distant reaches of the world. The countless rivulets of the international stream of commerce may be found far and wide. For anyone transacting business in a foreign country, there exists the inevitable possibility that products might make their way into the international market and into the United

[6] We also note that a foreign corporation is not subject to personal jurisdiction by virtue of being a subsidiary of a corporation headquartered in the United States. *See Keeton*, 465 U.S. at 781, n.13 (requiring that forum contacts of parent corporation and of wholly-owned subsidiary be assessed individually). Considering each corporate entity separately for personal-jurisdiction analysis comports with the rights that each entity holds as a "person" protected by the Due Process Clause. *See Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 881, n.9 (1985) (corporation protected as "person" under Fourteenth Amendment); *Grosjean v. Am. Press Co.*, 297 U.S. 233, 244 (1936) (same).

In the case of Dow Canada, its status as a foreign company not subject to jurisdiction in California is undiminished by its status as an indirect subsidiary of a corporation headquartered in the United States. Dow Canada is a Canadian company; it operates, has its headquarters, and employs people in Canada. Thus, Dow Canada is a Canadian concern.

States, especially given the collective purchasing power of the American market.

The "awareness" requirement of the stream-of-commerce test is no bulwark to defend due process. It is prone to sweeping generalities about "where" a defendant's products might be swept by the stream of commerce. In the instant case, for example, the New Jersey Supreme Court concluded that a defendant's awareness that its products are being sold to the United States generally equates to jurisdiction in New Jersey—and presumably each and every other State.[7]

The "awareness" requirement is also susceptible to being stretched to include "constructive awareness." Given the theoretical potential to surmise the scope of possible markets where products may be sold, enhanced by the potential to explore this by limitless efforts searching the worldwide web (should one choose to do so), the stream-of-commerce test would invite courts to find "awareness" in virtually any circumstance that a product lands in the forum. Courts unconstrained by a firm jurisdictional threshold have a tendency

[7] Implicitly recognizing that States lack the authority to arrogate such jurisdictional power to themselves, Justice O'Connor noted in *Asahi* that the Court had "no occasion here to determine whether Congress could, consistent with the Due Process Clause of the Fifth Amendment, authorize federal court personal jurisdiction over alien defendants based on the aggregate of *national* contacts, rather than on the contacts between the defendant and the State in which the federal court sits." *Asahi*, 480 U.S. at 112, n * (O'Connor, J., joined by three other justices) (emphasis in original).

to be aggressive in asserting personal jurisdiction on behalf of their resident plaintiffs. *See, e.g., W. Virginia ex rel CSR, Ltd. v. MacQueen*, 441 S.E.2d 658, 660 (W. Va. 1994) (expressing concern at the possibility that if West Virginia "declined jurisdiction, Mississippi plaintiffs will ravish whatever insurance fund CSR has available to pay injured plaintiffs at the expense of West Virginia plaintiffs").

The "awareness" requirement is susceptible to arbitrary application and manipulation in other respects. The test does not turn on the concrete, verifiable act of the defendant in shipping products into the forum, but on vagaries of proof as to what that defendant might have been thinking (or what some unspecified employee might have been thinking). Thus, the test tempts cross-complaining co-defendants, for example, to make disingenuous claims of having told the subject defendant that its products would eventually be distributed into the forum. On the other hand, the test invites ready denials by the subject defendant that it ever received such information—denials that could be correct, or that could be disingenuous, or that could be made erroneously but in good faith, depending on how the information was processed (if at all) by the person in the defendant's organization who supposedly received it.

Because the stream-of-commerce test is easily subject to arbitrary application, it does not comport with this Court's declaration that "the Due Process Clause ensures not only fairness, but also the 'orderly administration of the laws,' . . . ." *World-*

Wide Volkswagen, 444 U.S. at 294 (quoting *International Shoe*, 326 U.S. at 319).

With its "awareness" requirement, the stream-of-commerce test generates even more complications for foreign businesses by inviting them to follow the suggestion of several lower courts—including the Supreme Court of New Jersey here—to instruct foreign purchasers not to distribute their products to specified States. *See* pet. app. at 36a (*Nicastro v. McIntyre Machinery Am., Inc.*, 987 A.2d 575, 591 (N.J. 2010)) ("A manufacturer that wants to avoid being haled into a New Jersey court need only make clear that it is not marketing its products in this State."); *A. Uberti & C. v. Leonardo*, 892 P.2d 1354, 1363 n.8 (Ariz. 1995) (noting that defendant could have avoided personal jurisdiction in Arizona by "making some affirmative effort to preclude distribution of its products in our state"). For individual States to prescribe to foreign businesses around the world the disclaimers and instructions that must be given in foreign countries exceeds the bounds of state court jurisdiction.

Such an instruction, "Do not distribute to the State of ," also is susceptible to arbitrary application and manipulation. It could be given disingenuously, with a wink and a nod, or it could appear in fine print where, on the back of an invoice, it would never be read. Litigating the genuineness or effectiveness of such instructions would result in wasteful transaction costs as well as arbitrary results. Query whether each State would establish its own rules (or even forms) for

such provisions, to be followed by foreign businesses for their foreign transactions.

Nor does the United States benefit from policies that in fact encourage foreign businesses to eschew trade with anyone who may do business with United States markets. Any foreign business that so seeks to protect itself from being haled into court in any particular State would most likely endeavor to avoid jurisdiction by directing downstream purchasers not to deliver its products to *any* State.

Absent such concerted efforts to isolate the American market, the stream-of-commerce test forces virtually every foreign business to assume the risks and burdens of defending itself in every American jurisdiction. As a practical matter, every foreign manufacturer—from a bolt maker in Jakarta to a gas-tank maker in Québec—must account for the product-liability policies of 50 different States and assume the risk of being haled into any court in America. The burden of roundtrip airfare to attend a trial might not appear imposing, but the costs of retaining American defense counsel can be staggering to many foreign companies; and the "American rule" that each party bears its own attorney fees means that such expenses are incurred by the foreign defendant, no matter how meritorious its defense.

In sum, stream-of-commerce jurisdiction also improperly burdens foreign commerce and impairs the orderly administration of the laws.

IV. The Foreign Manufacture of a Product in Conformity with U.S. Safety Standards Is Not a Basis to Assert Personal Jurisdiction

In Dow Canada's case, the plaintiffs and co-defendant Bombardier argued that Dow Canada's predecessor "designed" its component for the California market by producing gas tanks that complied with Canadian Coast Guard and U.S. Coast Guard standards, in accordance with Bombardier's design specifications. *See* pet. (No. 10-250) at 7-8, n.5. While the California trial court did not give this argument any probative weight in Dow Canada's case, *id.*, the issue is apt to arise given the prevalence of U.S. and foreign safety standards for a wide array of products.

Meeting U.S. safety standards is not "purposeful availment" directed at any given forum State. For example, with respect to businesses that supply components in foreign commerce, by meeting general U.S. safety standards, a foreign component maker does not direct the component to any forum State. It simply allows a manufacturer who buys the component the subsequent option of selling the finished product in the United States—which remains the unilateral decision of the finished-product manufacturer. Meeting the standard, then, is at most just evidence of foreseeability that the component could end up in one of 50 different States. "Yet 'foreseeability' alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause." *World-Wide Volkswagen*, 444 U.S. at 295.

Nor would making products in conformity with U.S. safety standards meet either of the alternative minimum-contacts tests set forth in *Asahi*. Compliance with U.S. safety standards does not constitute the kind of "additional conduct" that can satisfy due process under the stream-of-commerce-plus test. Justice O'Connor opined in dicta on several possible factors to find such additional conduct, including "designing the product for the market in the forum State, ..." 480 U.S. at 114. But simply meeting a U.S. safety standard is not specifically designing a product for a particular forum State.[8] As noted above, Justice O'Connor

[8] The First Circuit rejected a comparable argument for jurisdiction based on the alleged "design" of a product for the Puerto Rico market. *Rodriguez v. Fullerton Tires Corp.*, 115 F.3d 81, 85 (1st Cir. 1997). The defendant sold tire-rim components outside the forum to a wheel manufacturer for use with sand-track tires, knowing that the end products would be widely sold *Id.* at 82, 84-85. Applying in substance the stream-of-commerce-plus test, the court held that the defendant was not subject to personal jurisdiction in Puerto Rico. *Id.* at 84-85. The court rejected an argument that the defendant should be deemed to have designed the product for Puerto Rico because it was designed for use in the sand and Puerto Rico has "an island ecosystem containing an abundance of sandy beaches ideal for dune buggies and other sandworthy vehicles." *Id.* at 85 The court found that basing jurisdiction on the design of a product for use in sand—which covers "roughly 18% of the world's land surface"—would offend constitutional limits. *Id.*

An example of designing a product for a particular forum State, on the other hand, might be producing, for inevitable sale in Texas, a toy football helmet that replicates the appearance of the Houston Texans' helmet—and which then becomes the target of a product-liability lawsuit for an injury

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expressly distinguished aggregate national contacts with the United States (which a State may not claim as its basis for jurisdiction) from contacts with a particular forum State. *See* n.7, *supra* (citing *Asahi*, 480 U.S. at 112, n.* (O'Connor, J., joined by three other justices)). Nor did Justice Brennan's opinion in *Asahi* ever suggest that the downstream marketing of a defendant's product to the United States as a whole could serve as the sole basis for jurisdiction in any given forum State. *Cf. Asahi*, 480 U.S. at 116-21.

Further, the interests of the United States are not served by deterring foreign businesses from considering and using U.S. safety standards, by threatening them with personal jurisdiction should they aspire to make products that meet such standards. Again, a foreign company's mere use of a U.S. safety standard is not an act by which the foreign company itself distributes its product to any particular State and thereby "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."

occurring in that State. Presumably, such a case would include evidence of distribution arrangements made by the nonresident defendant to have the product sold in that State.

CONCLUSION

Based on the foregoing and the arguments of others before the Court, Dow Canada respectfully requests that the Court hold that the stream-of-commerce test violates due process.

Respectfully submitted,

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